

CASE Nos. 11-3440, 12-1027 and 12-1936

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	:
Petitioner/Cross-Respondent	:
	: Cross Petitions for Review
v.	: and Petition for Enforcement
	: as to Decisions of the
NEW VISTA NURSING AND	: National Labor Relations
REHABILITATION, LLC	: Board (NLRB)
Respondent/Cross-Petitioner	:

REPLY BRIEF OF CROSS-PETITIONER,
NEW VISTA NURSING AND REHABILITATION, LLC
PURSUANT TO REHEARING ORDER OF AUGUST 15, 2014

Submitted by:

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DATE: December 9, 2014

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Summary of Argument

The matters before this Court, along with the record, should be remanded to the NLRB consistent with *Noel Canning* and the Court's January 31, 2012 Abeyance Order to restore the *status quo ante*, as requested in New Vista's Opening Brief, because the NLRB's responsive brief has abandoned that issue and the NLRB itself has been setting aside other prior determination in the wake of *Noel Canning* and exercising its concurrent jurisdiction to update the records prior to adjudication of other enforcement matters before Courts of Appeal. New Vista should be afforded the same procedural rights here.

The Court should reject the criteria put forward in the Board's Brief for the determination of supervisor status as it related to the authority to discipline, since they are inconsistent with the criteria the Board adopted below and would unreasonably result in the elimination of such status given the statutory definition of managerial employees adopted by the Supreme Court and the Board, which result is contrary to intent and legislative history of the statute.

The Court's Order of August 15, 2014 expressly directed the parties to rebrief this matter in its entirety pursuant to F.R.A.P. 28. F.R.A.P. 28(a)(5) and the Order required New Vista to provide a new Statement of Issues in its Opening Brief. The NLRB's argument that New Vista has waived an issue presented in its Opening Brief filed pursuant to the Order, but not in its prior briefs related to the

Court's vacated decision, is without merit since neither of the cases cited by the NLRB are on point. The Board's argument as to the underlying issue misses the point that the Board determined in other similar cases that a hearing prior to entering summary judgment was required, but failed to permit the same process to New Vista without explanation, even after reconsideration was requested, which failure requires remand.

The Rule of Necessity is inapplicable to the Quorum Issue involving the Board's December 30, 2011 reconsideration decision because this matter was already pending before this Court such that deferral pending the establishment of a proper quorum not a decision with a recused Member participating was needed.

New Vista otherwise relies on the arguments in its Opening Brief.

Argument

- I.** The NLRB Has Provided No Rebuttal to New Vista's Argument that the Court Restore the Parties to the Status Quo Ante In Accordance with the Court January 31, 2012 Abeyance Order; and, has therefore abandoned any defense

New Vista's Opening Brief at page 39 argued that the intervening events that gave rise to the grant of rehearing required the Court to restore the parties to the *status quo ante* prior to NLRB's transmittal of the record. The NLRB's Brief provides the Court with no rebuttal to New Vista's *status quo ante* argument.

In the Court's August 15, 2014 Order, the Court advised that any issue not specifically briefed shall be deemed abandoned. Since the NLRB has not briefed this issue, the NLRB must be deemed to have abandoned any defense. The NLRB's Footnote 2 cite to page 39 of New Vista's Opening Brief does not reach or rebut the *status quo ante* argument. The cases cited in Footnote 2 do not reach or rebut the argument.

Since the NLRB itself requested that these consolidated matters be held in abeyance and the filing of the record withheld until the NLRB issued its decisions on New Vista's 2012 reconsideration requests, the NLRB should not now be heard to the contrary where its intervening actions have been determined to be *void ab initio*. The NLRB does not argue that the transmittal of the record by an improperly constituted Board was other than *ultra vires*. The NLRB does not

argue that its prior reconsideration determinations were other than *ultra vires* and *void ab initio*. The NLRB does not argue that the present Board is unable to now properly determine the reconsideration matters voided as a result of the decision in NLRB v. Noel Canning, 134 S.Ct. 2550 (2014), or that now adhering to their own prior request that these matters wait for such action would be inconsistent with present Board policy and procedure.

The NLRB itself already has been setting aside its improperly entered decision in the wake of Noel Canning for the entry of new determinations and the transmittal of updated records for other enforcement actions to proceed: e.g., 800 River Road Operating Co., LLC, 361 NLRB No. 117 (November 26, 2014); Newark Portfolio JV, LLC, 361 NLRB No. 98 (November 12, 2014); Stamford Hospitality, L.P., 361 NLRB No. 116 (November 26, 2014); Stamford Plaza Hotel & Conference Center, 361 NLRB No. 115 (November 26, 2014); *see also*: New Process Steel, 355 NLRB No. 108 (2010) (curing voided prior decision after remand). The NLRB's Brief does not contest that the Board has been requesting Courts of Appeals, including this Court, to vacate and remand in the wake of *Noel Canning*. The relief requested in New Vista's pending Motion should now be granted since New Vista is entitled to the same procedural treatment and fairness here under the principles of *status quo ante*, as not contested in the NLRB Brief.

II. The NLRB's Brief Improperly Argues for a Statutory Interpretation of the Definition of "Authority to Discipline" that is different from that applied by the Board Below.

In NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 714-715, 121 S.Ct. 1861, 1867-1868 (2001), the Supreme Court of the United States noted that Board errors in interpreting the statutory definition of "supervisor" preclude enforcement of the Board's order. In the Court of Appeals decision in Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444, 454 (6th Cir. 1999), *aff'd*, 532 U.S. 706, 121 S.Ct. 1861 (2001), the Sixth Circuit stated that it has continued to overturn NLRB decisions finding that nurses are not supervisors even though the nurses direct others in providing patient care, address scheduling shortages, and have an evaluative role with respect to other employees, *citing* Allentown Mack Sales & Service v. NLRB, 522 U.S. 359, 118 S.Ct. 818 (1998), and criticizing the NLRB recurring revisions of previously stated interpretations of § 152(11) to impose a more stringent definition or a higher standard of compliance in certain factual contexts after the fact, such that Chevron deference was inappropriate. The problem identified in Allentown Mack Sales & Services v. NLRB and by the Sixth Circuit in Kentucky River is presented by the NLRB's positions in its Brief.

The NLRB's Brief concedes at page 22 that the statute requires only the possession of authority to discipline, not its actual exercise. The statute expressly states, 29 U.S.C. § 152(11):

The term “supervisor” means any individual having authority...to discipline other employees....or effectively to recommend such action.

The Record contains the factual findings of Regional Director at A850-A862. The existence of LPN authority is supported by the testimony of the Director of Nursing, by the testimony of individual LPN’s, by written records of LPN involved in the disciplinary process, by the LPN’s job descriptions, by New Vista’s Employee Handbook’s progressive discipline policies, and by testimony concerning in-service training provided on the LPN’s role in the disciplinary process. The Board cannot write off such indicia based on lack of frequency of the exercise of such supervisory authority, since the frequency of exercise of such authority will sometimes be exercised infrequently and sparingly and cannot be determinative. *See: Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1338 (11th Cir. 2012), *citing Caremore, Inc. v. NLRB*, 129 F.3d 365, 369 (6th Cir. 1997); *see also: NLRB v. Leland-Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1953) (§ 152(11) does not require exercise of the types of authority).

The assertion in the Board’s Brief at page 28 that, while New Vista’s progressive discipline policies in the Employee Handbook (A583-A585) was evidence of a defined system, New Vista’s practice conferred the Director of Nursing with discretion to determine the level of discipline in any given case, is

not supported by the Brief's citation to A216-A217 or the record as a whole, and demonstrates the improper exclusion and disregard of relevant evidence decried in Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d at 1337. The Director of Nursing agreed at A216-A217 only that she had discretion to determine how long of a suspension required by the progressive discipline system should be. The Board's Brief neglects to point out that the Employee Handbook sections cited in their Brief expressly provide for such discretion as to the length of "maximum penalties" involving suspensions. A0584 (suspension up to 5 days for Group I violations; suspension without specification of the length for Group II violations).

The Regional Director expressly found (A871): "The Record shows LPN involvement in actual progressive discipline." The Director of Nursing testified that such is the case (A0860). The Record demonstrates that the LPNs are involved in actual progressive discipline, that their involvement results in discipline, and that the Director of Nursing has only such discretion with respect to the resulting discipline as is reserved in the Employee Handbook.

This Court and the Board are bound by the findings of fact of record in this matter that are supported by substantial evidence, 29 U.S.C. § 160(e). The Board cannot ignore relevant evidence that detracts from its findings if its decision is to be supported by substantial evidence. Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d at 1335; GGNSC Springfield LLC v. NLRB, 721 F.3d 403, 407

(6th Cir. 2013), *citing* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456 (1951). The Board's mischaracterization of the Record undercuts its legal conclusion and precludes enforcement of its order. Lakeland Health Care Associates, LLC v. NLRB.

The Board's effort to distinguish Lakeland Health Care Associates, LLC, NLRB Brief at page 27 FN6, omits part of the Eleventh Circuit's reasoning. While the Board is correct that the LPNs there could directly suspend aides found to require "Level 2 Coaching," the Court found their role in initiating "Level 1 Coaching" separately supported their supervisory status where the findings became part of the employee's personnel file and, pursuant to the terms of the Employee Handbook, employees with "four active level one coaching plans will be terminated," 696 F.3d at 1341 (not cited in the NLRB's Brief). New Vista's Employee Handbook (A0584) provides for similar progressive discipline.

The Board's effort to distinguish Oak Park Nursing Care Center, 351 NLRB 27 (2007), NLRB Brief at page 27, is equally unavailing. In Oak Park, at pages 27-30, the Board expressly found that employee counseling forms that were sent to the Administrator for review; that were subject to determinations by the Director of Nursing or the Assistant Director of Nursing as to the "type of disciplinary action that needs to be taken against the employee"; that were subject to conferences with the employee and the LPN conducted by the Director of Nursing; and, that were

placed by the Director of Nursing in the employee's personnel file, were sufficient evidence of the LPN's supervisory status because such forms constitute disciplinary action in that they provide "a foundation for future disciplinary action against the employee." *Id.* at page 28 FN4. They do the same under New Vista's Employee Handbook (A0584) under similar circumstances.

Here, the Record is clear that New Vista's LPNs meet the "3-part test" for supervisory status established by the Supreme Court of United States in Kentucky River, 532 U.S. at 712-713, 121 S.Ct. 1861: (1) they "hold the authority to engage" in a supervisory function listed in § 152(11); (2) the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and, (3) their authority is held "in the interest of the employer." The statute requires only that the LPNs "hold such authority" and the measure of their holding such authority is not dependent on any frequency of its exercise.

The cases cited in the Board's Brief at page 28 do not comport with the plain meaning of the statutory text as interpreted in the Board's decision below and thereby present the evil condemned by the Supreme Court in Allentown Mack Sales & Service v. NLRB. In The Republican Co., 361 NLRB No. 15 (2014), the NLRB's interpretation of the statutory criteria for supervisory status based on "having authority...to discipline other employees" requires:

To confer supervisory status based on authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. . . .

Warnings that simply bring the employer's attention to substandard performance without recommendations for future discipline serve a limited *reporting* function, and do not establish that the disputed individual is exercising disciplinary authority.

This interpretation of the statutory criteria for finding supervisor status is inconsistent with the criteria applied by the Regional Director. The Regional Director (A0871) found it clearly established that a unit manager is a supervisor under § 152(11) where she initiates disciplines that were subject to the same independent review by the Director of Nursing as that of the he found LPNs not to be supervisors. The Regional Director's decision, as adopted by the Board below, did not require the absence of "independent investigation by upper management." The Regional Director's decision below permitted a finding of supervisor status based on exercises of independent judgment to initiate the disciplinary process.

The Board's Brief is changing the rules and applicable definitions after the fact, contrary to the requirements of Allentown Mack Sales & Service v. NLRB. This Court may not enforce the Board's order by adopting a legal standard the Board did not adopt below, however much the Board's Brief seeks to support it

with post-hoc rationalization. Kentucky River, 532 U.S. at 715 FN1 and 721, 121 S.Ct. at 1868 FN1 and 1871; *compare*: National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 981, 125 S.Ct 2688, 2699-2700 (2005) (Agency is free to adopt and apply a new interpretation of statute in an adjudication so long as the justification for the new rule is explained).

The Board's Current Position is Unreasonable and Alters the Balance Intended By Congress in amendments to the statute

The Supreme Court has recently confirmed that, even under Chevron deferential review, agencies must operate within the bounds of reasonable interpretation considering the statute as a whole. Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427, 2442 (2014). The statute, 29 U.S.C. § 152(3), expressly excludes from the definition of “employee” any individual “employed as a supervisor.”

In Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641, 417 U.S. 790, 807, 94 S.Ct. 2737, 2746 (1974), the Supreme Court found that Congress addressed the problem of employers’ rights to the undivided loyalty of individuals they employ as a supervisor by amending the definition of “employee” in 29 U.S.C. § 152(3) to exclude those denominated supervisors under 29 U.S.C. § 152(11), thereby excluding from them coverage under the statute. Congress also provided at 29 U.S.C. § 164(a) that:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

§ 164(a) raises the question of whether Congress intended the definition of supervisor in place when the statute was amended to remain constant in order to retain the balance in its resolution of the undivided loyalty problem. In Bell Aerospace, the Supreme Court determined, 416 U.S. at 289, 94 S.Ct. at 1768, that interpretations of the statutory language retained after Congress amended the statute in 1957 precluded the NLRB from reading new and more restrictive meanings into the statute. *See also: Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 177 (3rd Cir. 1980) (distinguishing Bell Aerospace to permit the Board to overrule prior decisions involving an area which Congress had clearly expressed to be within the Board's area of expertise).

This Court has noted that, where Congress incorporates a statutorily defined term into the provisions of another statute, such an explicit reference to the statutory definition demonstrates Congressional intent to forestall interpretation of the term by the administrative agency and as a limitation on the administrative agency's authority, instead giving weight to the state of the law at the time the statutory definition was enacted, which the lawmakers would be presumed to use as reference. Royce v. Hahn, 151 F.3d 116, 123 (3rd Cir. 1998). This result is

consistent with Bell Aerospace; and, should preclude the Board from imposing new and more restrictive meanings to the statutory definition of supervisor in § 152(11), less the balance intended by Congress in its amendments be frustrated.

The Republican Co., 361 NLRB at 7, while citing and not overruling Oak Park Nursing Care Center, pronounces a test for supervisory status that is plainly inconsistent with and more restrictive than the test applied by the Board in Oak Park, since the counseling forms in Oak Park were subject to independent investigation by upper management (i.e., by the Administrator, the Director of Nursing, and the Assistant Director of Nursing) and did not, contrary to the reference by the Board, result in “actual discipline” because the Board defined the filing of such forms as a form of disciplinary action. The Board appears to have completely reversed fields on these issues in Trinity Continuing Care Services, 359 NLRB No. 162 (2013) (failing to apply as sufficient the criteria that were found sufficient in Oak Park and requiring evidence of “actual consequences”).

Not only is the Board’s position inconsistent with its prior decisions and the standards it applied below, the decision unreasonably blurs the distinction between management and labor contrary to the principles in the legislative history of the statute discussed in NLRB v. Bell Aerospace Co., 416 U.S. 267, 94 S.Ct. 1757 (1974). The Board’s present position effectively precludes a finding of any non-managerial employee having authority to discipline other employees, since

managerial employees, who the Bell Aerospace Court found are not subject to unionization, are defined in part by their authority to effectuate management policies, 416 U.S. at 284 FN 13, 94 S.Ct. at 1767 FN 13, which requires them to be involved in the oversight of employee discipline. Managerial employees include those involved with personnel and labor relations policies. *Id.* The Board's The Republican Co. test for supervisor status involving authority to discipline does not mesh with the responsibilities of management to assure compliance with standards of fairness and due process in the employee discipline process. It effectively precludes the co-existence of managerial employees doing their jobs concerning supervisory staff's implementation and application of discipline policies. A supervisor's authority to discipline is no less real (in the real world) where a nurse aide is afforded the right to appeal or have an independent management review of a disciplinary act by an LPN. The Republican Co. test would preclude any supervisory status for staff whose decisions are subject to standard grievance procedures under collective bargaining agreements. The statutory scheme plainly contemplates the coexistence of supervisors with the authority to discipline and managerial employees with the authority to independent investigation was operational staff is doing to assure compliance with management policies. Bell Aerospace. The Board's preclusion of management involvement in the work of statutory supervisors is the kind of unreasonable misfit precluded in Kentucky

River. This Court should preclude its applications here as unreasonable and inconsistent with the Board's position below in this case and deny enforcement as required by Kentucky River.

III. The Order of August 15, 2014 Permits New Vista to Preserve for Review Any Issue Preserved Before the Board and New Vista's Issue C is Preserved and Requires Remand

The Board's Brief does not dispute that New Vista preserved below before the Board the issues presented in New Vista's Statement of Issues at "C" (pages 12-13) and in New Vista's Opening Brief at pages 48-51. The Court should reject the Board's argument, NLRB Brief at pages 35-36, that this issue is not permitted by the Court's Order of August 15, 2014 and is waived as a matter of law.

First, the Order required the parties to rebrief this matter in its entirety in accordance with FRAP Rule 28. The Rule requires New Vista to identify the issues New Vista will present for review and does not include the restrictions argued by the NLRB. The Court's use of the term "abandoned" in the Order of August 15, 2014 should not be construed to restrict the issues to those previously presented in the case, since the Court has used the term "abandoned and waived" to refer to issues not presented or developed in an appeal. Rhett v. Evans, 576 Fed.Appx. 75, 88 FN2 (3rd Cir. 2014) (deeming issue abandoned and waived), *citing* Kost v. Kozakiewicz, 1 F.3d 176, 182 (3rd Cir. 1993); Ramirez-Alvarado v. Attorney General of U.S., 414 Fed.Appx. 410, 415 (3rd Cir. 2011) (deeming the

issue abandoned and waived for failure to develop argument in opening brief).

Second, the cases cited in the Board's Brief at page 36, do not support the proposition for which they are cited. U.S. v. Quinn, 728 F.3d 243 (3rd Cir. 2013) involves a failure to preserve the issue in the Opening Brief, while New Vista did preserve the issue in its Opening Brief. U.S. v. McCarrin, 54 Fed.Appx. 90 (3rd Cir. 2002) also involves a failure to preserve the issue on direct appeal and that the issue is not preserved for subsequent matters by raising it in a petition for rehearing that is not granted. New Vista did not raise the issue in a petition for rehearing that was not granted and did raise it in its Opening Brief pursuant to the requirements of FRAP Rule 28 and the Court's August 15, 2014 Order after the Board's petition for rehearing was granted.

The Board Brief, at pages 37-42, misses New Vista's point. New Vista's petition for reconsideration (A0051-A0054) clarified the point to be that the procedural posture of New Vista's case and Frito Lay's was identical, but the Board ruled in Frito Lay's case that summary judgment would be denied and a hearing provided to develop the record, while New Vista was denied the same process without explanation. The Board's Brief asserts at page 40, citing 177 NLRB at 821, that the Board "emphasized...that it entertained this defense of changed factual circumstances because the employer's restructuring was clearly not for the purpose of avoiding compliance with the Board's unit finding." The

Board's Brief misstates the timing of the Board's statement. The Board made that statement after the hearing that was granted and based on the record developed by the Trial Examiner during that hearing. 177 NLRB at 821. The Board did not make that statement when it determined to grant Frito Lay a hearing and deny the motion for summary judgment; and, its decision does not suggest that it had such facts on which to base its grant of a hearing to Frito Lay.

Since the NLRB has yet to explain why Frito Lay got a hearing and New Vista did not, the relief requested by New Vista in its Opening Brief should be granted.

IV. The Rule of Necessity Does Not Apply To Cure the Quorum Defect in the Board's December 30, 2011 Reconsideration Order

The Board's Brief at pages 52-53 seeks to justify the participation of a recused Board Member based on the Rule of Necessity. The Rule of Necessity is not applicable where, as here, the reconsideration matter could be held in abeyance pending the appointment of additional members of the Board, just as the Supreme Court of the United States did in The North American Company v. SEC, 320 U.S. 708, 64 S.Ct. 73 (1943) (As four Justices have disqualified themselves from participating in the decision in this case, the Court is unable to make final disposition of it because of the absence of a quorum of six Justices as prescribed by 28 U.S.C.A. § 321. This case will accordingly be transferred to a special docket and all further proceedings in it postponed until such time as there is a quorum of

Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate); *see also*: Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (rejecting application of Rule of Necessary given available of alternative forum to resolve matter) and, at 1057 (Dissent of Circuit Judge Dennis) (Court could follow the Supreme Court's lead in The North American Company v. SEC to hold over the case until the President and Senate approve additional Board Members). Since the matter was already pending in this Court and the Board itself and this Court agreed to hold the matters in abeyance pending issuance of proper reconsideration determinations, no necessity can exist to support the application of Rule.

V. New Vista otherwise relies on the arguments in its Opening Brief.

Conclusion as to Relief Sought

WHEREFORE, New Vista requests this Court to deny enforcement and grant its Petitions for Review; or, in the alternative, grant its pending Motion.

Respectfully submitted,

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DATE: December 9, 2014

CERTIFICATIONS OF COUNSEL

I, Louis J. Capozzi, Jr., Esquire, hereby certify to the following:

1. This brief contains 4,227 words using Microsoft Word software.
2. The text of the electronic brief is identical to the text in the paper copies.
3. A virus detection program, Sophus Endpoint Security and Control, Version 10.0, has been run on the file and that no virus was detected.
4. Opposing counsel are Filing Users as provided in L.A.R. Misc. 113.4 and have consented to electronic service of the brief through the court's electronic docketing system (CM/ECF). I also certify herein that on this 9th day of December 2014, I am also mailing to each of them via first class U.S. mail, postage pre-paid, a paper copy of the brief.
5. I am admitted to practice in this Court of Appeals.

By: /s/ Louis J. Capozzi, Jr.

DATE: December 9, 2014

Certificate of Service

I, Louis J. Capozzi, Jr., attorney for New Vista, hereby certify that on this date a copy of the foregoing document was served via the Court's electronic file system on all parties or their counsel of record and by mail addressed as follows:

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